SINGLE BENCH

IN THE HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

W. P. NO.1275 OF 2005

PETITIONER

Surgi Aid Pharmaa, Health Care Equipment,Opposite Collectorate, Town Clock, Hall No.1, 2nd Floor, G. E. Road, Raipur through its Proprietor Krishan Vibhuti Anand, S/o Shri A. K. Anand, aged about 38 years, Tahsil & District Raipur [Chattisgarh]

VERSUS

RESPONDENTS

1. State of Chhattisgarh through Secretary, Department of Health & Family Welfare, Mantralaya, Dau Kalyan Singh Bhawan, Raipur [Chhattisgarh]

2. Director, Directorate of Health Services, Chhattisgarh, Raipur Behind Mantralaya, Raipur [(CG]

3. Nahar Medical Agencies, Balack Chowk, Bhantari Dist. Raipur(Chhattisgarh)

4. Tivitron Medical Systems Private Ltd. 15th Street, Abhiramapuram, Chennai- 600018(Tamilnadu)

5. Indian Surgical Equipment Co. Pvt. Ltd. C-6,Hauz Khas, Delhi- 110016

6. Bagree Enterprises, Near City Kotwali, Chhotapara, Raipur(Chhattisgarh)

7. Datt Enterprises Limited, 56, Community Centre, East of Kailash, New Delhi-110065

8. Allengers Medical Systems (P) Ltd. SCO-71, Sector-20C, Tribunal Road, Chandigarh(16020).

9. Gayatri Medical Agencies, 38, Medical Complex, Telipara (Behind Ajit Hotel), Bilaspur(Chhattisgarh)

P.R. No. 1258/05 Presented by Shri Anand Verma dated 23-03-05

Sd/- A.R (J)

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S.R.A.K

10. Sonu Medical Agency,
108, Mahalaxmi Market,
Pandri, Raipur(Chhattisgarh)

11. Ideal Medical Equipment & Electronic Co.
Maharana Pratap Nagar, Zone-II,
Bhopal(Madhya Pradesh).

WRIT PETITION UNDER ARTICLE 226/227 OF THE CONSTITUTION OF INDIA FOR ISSUANCE OF WRIT IN NATURE OF CERTIORARI, MANDAMUS, PROHIBITION AND OTHER SUITABLE WRIT OR WRITS, DIRECTION OR DIRECTIONS, ORDER OR ORDERS:

The petitioner, above-named, most respectfully submits as under:

A.F.R.

HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

Writ Petition No.1275 of 2005

Surgi Aid Pharmaa

- Versus -

State of Chhattisgarh & others

POST FOR ORDER ON 13TH JULY, 2005

Sd/-
L.C. Bhadoo
Judge

12-7-2005

A.F.R.

HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

Writ Petition No.1275 of 2005

Surgi Aid Pharmaa

- Versus -

State of Chhattisgarh & others

Present: -

Shri Manindra Shrivastava, Sr. Advocate with Shri Amrito Das, Advocate:	For the petitioner.
Shri Prashant Mishra, Addl. A. G.:	For respondents No.1 & 2.
Smt. Fouzia Mirza, Advocate:	For respondent No.3.
Shri P. Diwakar, Sr. Advocate with Shri Kunal Das, Advocate:	For respondent No.4.
Shri B.P. Sharma, Advocate:	For respondents No.6 & 9.
Shri Sanjay K. Agrawal, Advocate:	For respondents No.7 & 10.
Shri Ranbir Singh Marhas, Advocate:	For respondent No.8.

BEFORE HON'BLE MR. L.C. BHADOO, J.

O R D E R

(Passed on 13th July, 2005)

1. The petitioner, who is engaged in the business of selling and supplying medical equipments to the Government Departments, particularly, the Health Department, has preferred this writ petition questioning the legality and propriety of the decision of respondent No.3 whereby the petitioner's tender has been rejected in respect of 69 items and respondent No.2 accepted the tenders of respondents No.3, 4, 8 and other respondents in respect of near about 22 items.

2. Brief facts, as set out in the petition, leading to filing of this writ petition are that respondent No.2 issued N.I.T. on 22-7-2004 for purchase of 78 medical equipments. The said N.I.T. was published in the newspaper namely "Indian Express" on 30-7-2004 and again it was published in the Hindi newspaper 'Navbharat' on 9-8-2004 whereby

tenders were invited from Authorized Distributors/Importers for supply of medical equipments. The last date for submission of the tender was initially 6-9-2004, which was extended to 30-9-2004 by advertisement dated 9-8-2004.

3. Further case of the petitioner is that in response to the said N.I.T. he submitted tender documents in respect of all the 78 items. Thereafter, respondent authorities proceeded to open Pre-qualification bids on 1-10-2004 at about 12 p.m. in the Office of respondent No.2. After opening of Pre-qualification bid, the Purchase Committee comprising of 10 members scrutinized the details and documents forming part of Pre-qualification bids. The Committee informed that the names of qualified tenderers in Pre-qualification bid would be subsequently informed in writing. On that day everything of the petitioner's Pre-qualification bid was found in order but with regard to 4-5 tenderers it was transpired that there were certain irregularities and defects in their documents.

4. Vide letter dated 12-10-2004 (Annexure-P/5) the petitioner was informed by respondent No.2 that the technical bid is proposed to be opened on 14-10-2004. This being the second stage of finalization of tender, similar notices were issued to 6 other tenderers, thus, it became clear that Pre-qualification bids of only 7 tenderers were found to be in order, therefore, it was decided to open the technical bids of all the 7 successful tenderers including the petitioner. However, on 14-10-2004 when the petitioner attended the meeting, he was surprised to know from the Committee that the Committee has some doubts with regard to certain documents submitted by the petitioner. They were 18 in number. This was complete departure from the laid down procedure as all these documents were thoroughly seen and after full satisfaction, they arrived at a decision to open Pre-qualification bids. 18 numbers of documents in respect of which doubts were raised were part of pre-qualification and once Pre-qualification found was over, it

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was wholly arbitrary and unreasonable on the part of the Purchase Committee to suddenly rake up the same issue again. In the minutes of meeting dated 14-10-2004 no objection was taken with regard to following aspects: (i) the agency agreement does not bear any date and item; (ii) the ISO certificates did not contain items; and (iii) authorization letters do not bear dates. After opening of the technical bid of the petitioner in respect of 78 items, no objection was raised nor the petitioner was informed regarding any defect or shortcoming in any of the detail and document of the technical bid. The tenderers were informed that now their technical bids would be forwarded to the Technical Committee as per the procedure prescribed.

5. On 14-10-2004 the exercise undertaken by the Purchase Committee was not with regard to technical bid but it was an exercise to dig up some kind of defects or shortcoming in pre-qualification documents of the petitioner. On 5-11-2004, the petitioner was shocked to learn that while sending the technical bids of the tenderers including the petitioner, the technical bid of the petitioner in respect of about 15 items was forwarded to the Technical Committee by the Purchase Committee and technical bids of the petitioner in respect of remaining items were withheld. Therefore, the petitioner made several representations against such action of the Technical Committee from 5-11-2004 to 10-11-2004 (Annexure-P/7). The petitioner again received letter on 17-11-2004 by which it was informed that the Purchase Committee on 17-11-2004 itself proposes another round of exercise of scrutiny of Pre-qualification bid and the meeting was fixed on the same day at 5 pm in the evening. It became very clear that, time and again, the exercise of scrutiny, re-scrutiny and third round of scrutiny of Pre-qualification bid is being undertaken to somehow dig out any irregularity or defect in the petitioner's documents so that the petitioner's technical bid in respect of all the 78 items may not take place. In the meeting held on 17-11-2004 the petitioner was surprised

and shocked to see that suddenly 4 tenderers were present whose Pre-qualification bids were not accepted earlier nor their names announced on 14-10-2004 and they were not even called in the meeting dated 14-10-2004 by issuing notice similar to the notice dated 12-10-2004 issued to the petitioner. On 17-11-2004, the Purchase Committee again re-opened the Pre-qualification bid scrutiny exercise. On that day some objections were raised with regard to Pre-qualification documents submitted by the petitioner by referring some of the documents like I.S.O. certificates, Agency agreement, authorization letters etc, which were contrary to the procedure prescribed.

6. It was so noted by the petitioner in his own handwriting in the proceedings of the Purchase Committee dated 17-11-2004. The petitioner again made a representation on 2-12-2004 and vide letter dated 20-12-2004 the petitioner was informed regarding the meeting scheduled to be held on 22-12-2004 for opening of the price bids. After receiving this letter, the petitioner again submitted a representation that price bids should not be opened till the decision of representations submitted by the petitioner. However, without considering the petitioner's representations the price bids were opened on 22-12-2004 and the petitioner found that his price bid has been opened in respect of only 12 items and for remaining items price bid was not opened. Vide letter dated 4-1-2005 the petitioner was required to make demonstration in respect of the items for which he was found L-1. The price bids of other tenderers namely respondents No.3 to 11 were opened. The petitioner can definitely say that the rates quoted by the petitioner are lower than the rates quoted by the aforesaid tenderers in respect of all the remaining items. Finally a representation was made to the Chairman, Central Purchase Committee on 3-2-2005, but the same also failed to evoke any response till date. Even respondent No.3 was not eligible on the last date of submission of the tender as his turn over for the year 2002-03 and 2003-04 was less

than Rs.4.5 crores. Its turn over was only Rs.2.80 crores for the year 2002-03.

7. Return has been filed on behalf of respondents No.1 and 2 in which it has been mentioned that correct procedure was adopted by the respondents and orders for purchase in respect of 31 items have been placed. The rates of 31 items have been approved by the Central Purchase Committee. The purchase of instruments for Department of Health and Family Welfare is of sensitive nature as most of them are life saving instruments and any compromise on quality or specification vis-à-vis terms and conditions of the tender notice shall ultimately affect public at large, therefore, the instant petition challenging the decision taken by the respondents in public interest is not maintainable. It has further been mentioned that Pre-qualification was examined from 1-10-2004 to 12-10-2004. The letters were issued on 12-10-2004. The Purchase Committee met on 14-10-2004. Thereafter from 14-10-2004 to 20-10-2004 representations were received from the tenderers and on 20-10-2004, after considering the representations, 5 more tenderers were found to be qualified. The tender Purchase Committee after verification of records, documents made available by each of the tenderers, prepared the prè-qualification checklist for each of the tenderers determining the tenderers and company wise qualifications (Annexure-R/6). The Purchase Committee also prepared item wise pre-qualification report for the qualified companies vide Annexure-R/7. After evaluating pre-qualification condition mentioned in the N.I.T., the company wise/item wise checklist was prepared by the Purchase Committee vide Annexure-R/8 whereby the rates of only 38 items have been approved by the Central Purchase Committee and out of that 31 items have been purchased by the respondents. The procedure adopted by the Purchase Committee and approved by the Central Purchase Committee is just, fair, reasonable and transparent, which is proved by the fact that 9 items for which tender has been

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submitted by the petitioner has been approved. The tenderers have been granted opportunity to represent against the findings recorded by the tender committee regarding their pre-qualification, therefore, principles of natural justice have also been followed. The proceedings of the meeting dated 14-10-2004 would indicate that all the parties were allowed to make their observations wherein it was mentioned that the objections raised regarding authorization. It was further mentioned by the tenderers including the petitioner that if any document is not submitted, then they may be allowed to submit their documents because price bid was not opened. After considering the representations received from the tenderers who were disqualified in the pre-qualification bid before finalizing the technical bid, 5 more tenderers were allowed to participate after coming to know that they fulfilled the requirements of pre-qualification. This was done in a meeting of the Purchase Committee held on 20-10-2004.

8. When on examination it was found that there were serious shortcomings in the documents submitted by the petitioner and other parties, they were called to indicate that whether they have fulfilled the requirements, but they could not satisfy the authorities. Hence, those documents in respect of which serious shortcomings were observed were not sent for technical examination before the technical committee. The Purchase Committee after examining all the documents tabulated all the items, names of the companies, selected companies and has also given reasons for rejection of items. The petitioner submitted certain irrelevant documents from the manufacturer of company for example Siemens and his agency agreement document does not mention the date of issue and also does not bear the signature of authorized signatory of the manufacturer. Every possible opportunity was afforded to the petitioner and all other tenderers to clarify documents with testimonials, but the petitioner failed to clarify with regard to those documents. The petitioner's and other tenderers' bid

have not been accepted. It has been prayed that the writ petition be dismissed.

9. Return has also been filed on behalf of other respondents.

10. I have heard Shri Manindra Shrivastava, Sr. Advocate with Shri Amrito Das, Advocate for the petitioner; Shri Prashant Mishra, Additional Advocate General for the State/respondents No.1 & 2; Smt. Fouzia Mirza, Advocate for respondent No.3; Shri P. Diwakar, Sr. Advocate with Shri Kunal Das, Advocate for respondent No.4; Shri B.P. Sharma, Advocate for respondents No.6 & 9; Shri Sanjay K. Agrawal, Advocate for respondents No.7 & 10; and Shri Ranbir Singh Marhas, Advocate for respondent No.8.

11. Shri Manindra Shrivastava, learned Senior Counsel for the petitioner argued that once in the meeting dated 1-10-2004 the petitioner's pre-qualification tender was found to be in order and thereafter, on 14-10-2004 meeting was fixed for opening of technical bid, the Purchase Committee was not authorized to re-open the scrutiny of pre-qualification tender and question the documents of the petitioner which were already considered to be in order. Second ground of attack was that on scrutiny of Pre-qualification, tenders of 5 persons were not found to be in order, therefore, the Purchase Committee was not authorized to allow those persons to rectify their defects. This procedure was not as in terms and conditions of N.I.T., therefore, whole process of award of contract stands vitiated. He further submitted that respondents were allowed to rectify their tender documents, whereas, the petitioner was never served with any notice in writing asking him to rectify the defect, if any, in respect of Agency agreement, ISO certificate and authorization letters. He further argued that those persons were allowed to submit the Agency agreement, ISO certificates and the authorization letter, and even the documents regarding their financial status, which were the main basis

of the Pre-qualification. He also urged that even respondent No.3 was not eligible to submit his tender because as per the terms and conditions of N.I.T. till the last date of filing of the tender document he was not able to submit his affidavit or certificate from the Commercial Tax Department regarding his turn over worth Rs.4.5 crores during the financial years of 2002-03 and 2003-04, but he was allowed to submit the same later on. The document submitted by respondent No.3 regarding his financial capacity shows that amended return was filed, but there is nothing on record which proves that he was assessed by the Sales Tax Officer having the business turn over of Rs.4.5 crores both the years.

12. On the other hand, learned Additional Advocate General submitted that respondents received representations in between 14-10-2004 to 20-10-2004 regarding tender documents. On considering those representations, the Committee reached to the conclusion that the petitioner does not fulfill the terms and conditions of the NIT, therefore, his tender document was scrutinized. Similarly, tender documents of other persons were also scrutinized and all the parties were allowed to rectify their defects and full opportunity was granted to everyone, therefore, contention of learned counsel for the petitioner that the petitioner was not allowed to rectify the defect is not correct. He further submitted that the petitioner was informed about the defect vide Annexure-P/6. He also argued that purchase order has already been given by respondent No.2 to respondents No.3, 4, 8 and other respondents, even they have made the supplies, therefore, writ as asked for cannot be issued.

13. Shri P. Diwakar, learned Senior Counsel for respondent No.4 submitted that supply has already been made. This petition has been filed after the purchase order was issued in favour of respondents and the same has not been challenged, therefore, the writ petition is liable to be dismissed. He further submitted that the letter Annexure-R/4-2 dated

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17-11-2004 was given to all the contractors to appear before the Committee for re-scrutiny of their forms.

14. Shri B.P. Sharma, learned counsel for respondents No.6 and 9 submitted that the petitioner has not mentioned his status. This petition has been filed on behalf of the Company whereas, it ought to have been filed on behalf of Krishan Vibhuti Anand. As the firm cannot claim fundamental right, therefore, the petition should be dismissed.

15. Shri Sanjay K. Agrawal, learned counsel for respondents No.7 and 10 submitted that notification of award and award of contract has not been challenged, therefore, writ petition is liable to be dismissed.

16. Smt. Fouzia Mirza, counsel for respondent No.3 submitted that as per the document Annexure-R-3/9 dated 5-1-2005 it is apparent that the turn over of respondent No.3 was more than Rs.4.5 crores and respondent No.3 was entitled to file amended return before the Sales Tax Officer, as such there is no substance in the argument of learned counsel for the petitioner that respondent No.3 was not eligible in terms of turn over for the year 2002-03 and 2003-04.

17. As far as the question of judicial review to be exercised in contractual matters is concerned, as back as in the year 1979, Hon'ble the Apex Court in the matter of **Ramana Dayaram Shetty vs. International Airport Authority of India and others** reported in **(1979) 3 SCC 489**, held that

> "Administrative authority is equally bound by the norms, standards and procedures laid down by it for others - Disregard of the norm or standard would invalidate is action unless based on some valid principle which is neither irrational or unreasonable nor discriminatory - Rule against such arbitrary action applies independently of Article 14."
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> "Standard of eligibility laid down in the notice for tenders, held, cannot be departed from arbitrarily - Such departure from the standard, held, will amount to denial of equality of opportunity to those who felt bound by the

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standard of eligibility and therefore did not submit their tenders."

"Relaxation of the standard of eligibility at the time of considering the tenders or applications, held, will amount to a denial of opportunity to those who considering themselves ineligible did not apply."

(Emphasis supplied)

18. Again in the matter of **Tata Cellular vs. Union of India** reported in **1994 (6) SCC 651**, the Apex Court held that judicial review can be exercised by the Court in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of that power of judicial review Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There is no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down. The Court further observed that the duty of the Court is to confine itself to the question of legality. Its concern should be: (i) whether a decision-making authority exceeded its powers? (ii) committed on error of law; (iii) committed a breach of the rules of natural justice; (iv) reached a decision which no reasonable Tribunal would have reached; or (v) abused its powers. It is not for the Court to determine whether particular policy or particular decision taken in the fulfillment of that policy is fair. <u>It is only concerned with the manner in which those decisions have been taken</u>. The extent of the duty to act fairly will vary from case to case. Judicial review can be classified as under illegality, irrationality and procedural impropriety.

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19. In the matter of **Air India Limited vs. Cochin International Airport Limited** reported in **(2000) 2 SCC 617**, the Apex Court held that

> "The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. *The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny.* It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness."
>
> (Emphasis supplied)

20. Again in the matter of **Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation and others** reported in **(2000) 5 SCC 287**, the Apex Court held that the terms and conditions in the tender are prescribed by the Government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It is not for the Courts to say whether the conditions prescribed in the tender under considerations were better than the one prescribed in the earlier tender invitations. But, in case of the deletion of eligibility condition after expiry of the time-limit for submission of tenders, but before opening the tender, the Court held that award of contract to a tenderer who at the time of submission of tender did not satisfy the said condition rightly set aside by High Court as arbitrary. The Apex Court further held that the Government

cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate.

20. In the matter of **W.B. State Electricity Board vs. Patel Engineering Co. Ltd. and others** reported in **(2001) 2 SCC 451**, the Apex Court held that

> "Rule of law and constitutional values, must be adhered to when awarding contract - Rules and instructions must be complied with scrupulously in order to avoid discrimination, arbitrariness and favouritism, which are contrary to rule of law and constitutional values - Relaxation by State or its agencies of a rule or condition in favour of a particular bidder, held, not permissible unless expressly provided for in the rules."
>
> "Adherence to the rules, held, is the best principle to be followed in the public interest."

It was further held that

> "where bidders who fulfill pre-qualification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and constitutional values".

(Emphasis supplied)

21. In the matter of **Dutta Associates Pvt. Ltd. vs. Indo Merchantiles Pvt. Ltd. and others** reported in **(1997) 1 SCC 53**, the Apex Court held that

> "Acceptance of tender - Decision-making process should be transparent, fair and open - Any abuse of power for extraneous reasons would make the authorities concerned liable to appropriate punishment."

22. In the light of above principles regarding exercise of judicial review in contractual matters to be entered by the Government, we have to examine the facts of the present case. In the first instance, Shri Manindra Shrivastava, learned Senior Advocate for the petitioner argued that once on 1-10-2004 the petitioner along six other tenderers

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were found to be qualified in pre-qualification, thereafter, respondent No.2 was not entitled to review the petitioner's pre-qualification again. I am afraid, if such an approach is allowed to be applied in contractual matters then many a times it cannot be ruled out that the concerned authorities may commit mistake or exercise power in arbitrary manner with favouritism. When the tenders are invited in three envelopes, first for pre-qualification bid, second for technical bid and third for price bid, and after passing through the three scrutinies one of the tenders is to be selected by the authority, in that case, in my opinion till the final contract is entered into after scrutiny, the concerned authorities are always entitled to review the decision already arrived, if any infirmity, irregularity or mistake is brought to the notice of the authority by any of the tenders or by the Office. Because, the tenderer is bound to fulfill the terms and conditions of the tender without which he cannot be entitled for the contract. The authorities are always at liberty to review their decision and ask the tenderer to explain and clarify the position. In such a situation, the tenderer whose case is being reviewed, of course, is entitled to be heard and given opportunity before any decision is reviewed or changed. Therefore, reviewing the pre-qualification bid by respondent No.2 cannot be held to be arbitrary in any manner. In this regard, I am fortified in my view by the decision of the Kerala High Court reported in **AIR 2001 Kerala 388 (M/s. Asian Techs Ltd. vs. State of Kerala and others).**

23. Now, coming to the question whether respondent No.2 before selecting various tenderers for various items adhered to the terms and conditions of the N.I.T. and the above principles initiated by the Apex Court, if we look into the procedure adopted by respondent No.2 in scrutinizing the tenders in question, in the first instance on 1st October, 2004, out of 15 tenderers, 7 tenderers including the petitioner were found passed the first test of pre-qualification,

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however, 8 other tenderers could not qualify the test and their tenders were rejected at the preliminary stage. Even in proceedings dated 14-10-2004, which was fixed for opening of technical bids, the technical bids of 7 firms including the petitioner who passed the test of pre-qualification were opened in presence of the parties. On that day the technical committee was requested that before opening the price bid they should inform the technically approved parties about the product name, product code and name of the manufacturer, and that if anybody will have any objection can raise objection with 3-4 days.

24. Vide letters dated 12-10-2004 (Annexure R-1) Siemens, Trivitron, Interkardio, Metro Pharmaceuticals, Larsen & Toubro, Allengers, Scientific Traders and Datt Enterprises Ltd. were informed that on account of non-fulfillment of requirement of the tender forms mentioned in the Notice their tenders stand rejected. In between 14-10-2004 and 20-10-2004 some of the tenderers whose tenders were rejected not being qualified in pre-qualification exercise namely, Allengers Medical Systems (Pvt.) Ltd., Siemens Ltd., Interkardio Pvt. Ltd., Datt Enterprises Ltd., and Trivitron Medical Systems Pvt. Ltd., had filed their objections. However, the petitioners and other six firms were informed that on 14-10-2004 their technical bids will be opened. Therefore, the eight firms whose tenders were rejected in pre-qualification started pouring in representations. In 20-10-2004 proceedings of the Purchase Committee their documents were again re-examined and perhaps some of the tenderers were allowed to file their documents and ultimately five more persons whose tenders were rejected were declared qualified in the pre-qualification namely, Allengers, Siemens, Interkardio, Datt Enterprises and Trivitron.

25. Against this exercise, Shri Manindra Shrivastava, learned Senior Counsel argued that this action of respondent No.2 was arbitrary. The tenders of the above five parties were re-examined in order to rectify their defects and allow them to be qualified. He also argued that this

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exercise was undertaken in absence of the petitioner and other qualified parties in a suspicious and clandestine manner with connivance of these parties.

26. In this connection, if we look into representation dated 19-10-2004 of Datt Enterprises who was ultimately declared qualified in the pre-qualification bid, in the second page in last paragraph it has been mentioned that "The Documents about certain items No.6, 17, 20, 63 and 77, the required valid Certificates of ISO and CE till 5-12-2005 and 21-12-2008 with regard to these items have already been submitted vide our letters No.DEL/140 dated 1-10-2004 and DEL/145 dated 12-10-2004 and letter dated 18-10-2004 for consideration for these items also." This shows that after the last date of filing tender documents i.e. 30th September, 2004, this firm was allowed to file documents after the expiry of last date, and these documents were taken into consideration while reviewing its case and declared him qualified.

27. Similarly, Gayatri Medical Agencies whose tender was rejected on account of item No.6, 11, 12 & 18 on the ground of authorization letter and agency agreement also submitted a representation dated 18-10-2004. Learned Senior Counsel appearing on behalf of the petitioner submitted that in the aforesaid representation dated 18-10-2004 it has been mentioned that "Presently we are submitting the original authorization and agency agreement of our foreign principle kindly consider the same". Therefore, this firm also had not submitted the original documents at the initial stage. Even Nahar Medical Agencies had earlier submitted only Xerox copy and vide letter dated 18-10-2004 they submitted, " We have not submitted the ISO of Opto System Pvt. Ltd. in tender. But at present we are having the same, with due permission we may present the same. ISO certificate huntleight is expired last year and the company has renewed the same with due permission, we may submit the renewed copy of ISO." This shows that

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ISO certificate was not submitted along with the tender documents. Similarly, Ideal Medical Equipments also submitted their documents along with their representation after receiving the rejection. Similarly, vide letter dated 19-10-2004 Sonu Medical Agency mentioned, "By our mistake we had enclosed documents of our principals instead of Manufacturer as per required by the tender terms and conditions. We thus hereby request you to kindly accept the required documents of manufacturers for the above tender and oblige us." Vide this letter they submitted number of documents. Bagree Enterprise had also submitted representation dated 14-10-2004 mentioning therein that "all the above manufacturers have marketing tie-up with Indian companies as mentioned above and the above Indian companies have provided us the letter of authority along with ISO and CE certificates".

28. Therefore, in view of the above, respondent No.2 allowed the tenderers whose tender was rejected in pre-qualification to submit the ISO certificate, authority letter and other documents after expiry of the last date of tender, and after considering these documents they were declared qualified. Moreover, it has not been recorded in the Minutes or in the proceedings that as to how this review was conducted, in whose presence this review was conducted, whether any opportunity was given to those tenderers, to examine these documents, whose tender was found in order, and which kind of documents were taken on record. In the circumstances, this whole exercise was done in contrary to the principles of natural justice, fair play and in an arbitrary manner. Whereas till 20th October, 2004, the petitioner firm was pre-qualified, however in meeting dated 17-11-2004 the petitioner firm was declared as fail to qualify in the pre-qualification in respect of certain items as the ISO certificates did not contain list of items for which Company submitted by the petitioner, the agency agreement does not bear any date and name of all the items and the authorization

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letters do not bear any date. When other firms were allowed to submit the documents in all fairness, when the petitioner was declared qualified in pre-qualification test, before rejecting its tender on 17-11-2004, respondent No.2 ought to have given opportunity to the petitioner asking him to clarify the position about these objections and submit documents showing ISO certificate, agency agreement when it was executed and the date of authorization letters. Such opportunity was given to those tenderers whose tenders were rejected at the initial stage. No such written notice was sent to the petitioner nor in any proceedings it has been recorded that the petitioner was asked or given time to explain and clarify its position about these documents and submit these documents. Therefore, principles of equal opportunity, natural justice and fair play had been given go by in this matter by respondent No.2.

29. Now, the question comes whether respondent No.2 was entitled to take authorization letter and ISO certificate after expiry of the last date from the tenderers, in this connection, if we look into clause 3 of Preliminary Examination of the Special Terms & Conditions (SCC) at page 43 of the writ petition, it envisages that "the Purchaser may waive any minor informality, nonconformity, or irregularity in a bid which does not constitute a material deviation, provided such waiver does not prejudice or affect the relative ranking of any Bidder". Therefore, respondent No.2 in view of this clause was entitled to waive only minor informality or nonconformity or irregularity which does not constitute a material deviation, that too subject to such waiver which does not prejudice or affect the relative ranking of any bidder. In my considered opinion allowing the parties to file ISO certificate and authorization letter after expiry of the last date was not a minor informality or nonconformity or irregularity, but this was the main condition of any tenderer to become eligible for filing a tender. Therefore, respondent No.2 was not entitled to waive these

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requirements after last date i.e. 30-9-2004 being material deviation. Respondent No.2 being a public servant entrusted with power to deal with public fund ought not to have allowed such material deviation on the back of tenderers.

30. The petitioner's case is that he had already submitted the certificates but, as per the objections the ISO certificate did not contain the list of items, the agency agreement does not bear any date and name, and the authorization letters do not bear any date. Therefore, case of the petitioner was also similar to that of other parties whose representations were allowed and they were also allowed to submit the documents even after the expiry of last date of filing of tender documents. Therefore, he was also entitled for similar treatment by respondent No.2/Purcahse Committee.

31. As has been mentioned above, the Apex Court in the matter of **W.B. State Electricity Board (supra)** has categorically held that the rules and instructions must be complied scrupulously in order to avoid discrimination, arbitrariness and favouritism. Adherence to the rules and instructions is the best principle which cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and constitutional values. Therefore, in the first instance, respondent No.2 ought not to have allowed any firm to file the documents which were the main documents for becoming eligible to file during tender i.e. ISO certificate, authority letter etc., even if they have permitted then on the same principle the petitioner also ought to have been allowed and permitted to rectify those defects within 5 days to be fixed by respondent No.2. Moreover, the record of proceedings ought to have been prepared by the Purchase Committee regarding re-scrutiny indicating in whose presence the parties were permitted to rectify the defects and as to what kind of documents were allowed to be filed.

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32.Now, coming to the question that respondent No.3 was not qualified on account of non-fulfillment of the condition of turn over as per clause 5 of the Invitation of Bid (Envelope-1) in which it has been mentioned that "Average annual turnover of participant. It should more than Rupees Five Crores during the last two years certified by the Sales Tax Authority 2002-2003, 2003-2004. 10% + & - of Five Crores may be accepted if tenderers fulfill other terms and conditions of the tender." The petitioner herein has vehemently opposed and raised the point in the writ petition and rejoinder filed that till 30th .September, 2004, respondent No.3's turnover was not as per the terms of the tender. In rejoinder it has been mentioned that in respect of Nahar Medical Agencies the petitioner has specifically raised this view, but the respondent authorities have materially ignored, as they are fully aware of the fraud played by Nahar Medical Agencies. Undue favour has been shown to Nahar Medical Agencies. The State has simply replied that the tender is as per the terms and conditions of NIT. It has not been specifically replied by them that certificates of the Sales Tax Department as per the terms and conditions were submitted. Even respondent No.3's reply is also evasive. In additional rejoinder dated 27-5-2005, the petitioner again mentioned that so far as the eligibility of respondent No.3 for lack of required turnover is concerned, the State has kept surreptitiously mum without disclosing anything whereas, respondent No.3 is avoiding to place on record complete details of its sales tax returns submitted by it for the years 2002-03, 2003-04 and revised return, if any. However, respondent No.3 filed a document dated 5-1-2005 (Annexure R-3/9) issued after one year three months of the last date of filing the tender in which it has been mentioned that in year 2002-03 the original turn over in the first instance was Rs.11,89,983/- and then Rs.17,64,678/-. Thereafter, two amended returns were filed and both the returns were more than Rs.2 crores each, but as to when they were filed and whether they have

been assessed is not clear from these documents. Similarly, for the year 2003-04 original return was of more than Rs.22,89,000/- and thereafter three additional amended returns were filed one was for Rs.1,06,54,213/-, other was for Rs.1,58,45,388/- and the third one was for Rs.1,65,37,978/-. When these amended returns were submitted it is not known. As per the condition of NIT, clause 5 of the Invitation of Bid, respondent No.2 ought to have asked respondent No.3 to file the certificate of Sales Tax Authority showing annual turn over for the years 2002-03 & 2003-04.

33. In the given situation, when regular objections were being raised by the parties, it was the duty of respondent No.2 to have verified from the Sales Tax Department in order to ascertain whether respondent No.3 was eligible in terms of the turn over as on 30th September, 2004. But, respondent No.2 instead of entering into such an exercise which was necessary has filed an evasive return which cannot held to be justified in any manner. Respondent No.2 is a public functionary and while dealing with such high value contracts where public money was involved his duty was to abide by the terms of the NIT in order to prevent any irregularity.

34. Now, coming to the objection raised by Shri B.P. Sharma, Advocate appearing on behalf of respondents No.6 & 9 that the petition presented in the name of firm is not maintainable, as the petition has been filed by the firm, the firm has no locus standi to file the petition, and firm cannot claim fundamental right. But, I do not find any substance in this argument for the reason that the petition has been filed through Proprietor Krishan Vibhuti Anand, as the firm was the tenderer and Krishan Vibhuti Anand is the Proprietor of the firm who has filed this writ petition. Therefore, the point raised by learned counsel for respondents No.6 & 9 is without any force.

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35.Learned counsel for the respondents argued that supply has already been made by the respondents, therefore, the petition has become infructuous. In reply, learned Senior Counsel for the petitioner argued that it is true that to certain extent supplied have been made. When the respondents came to know about filing of this writ petition in hot-haste placed the order for supply and supplies have been made. Learned Senior Counsel further argued that so far order has been placed in respect of only 31 items. Moreover, the tenders were invited for supply of 78 items for a period of two years and in future also the need may arise, therefore, the petition cannot be thrown away on this ground.

36.It is true that the tenders were invited for two years for supply of 78 items and supply has been ordered only in respect of 31 items, therefore, at this stage, the petition cannot be thrown on this ground. In respect of the supplies, which have already been made by the respondents, the petitioner is entitled to take appropriate proceedings in the appropriate forum. But, in respect of the supplies, which are yet to be ordered and to be made by the tenderers in respect of the NIT, the petition cannot be held to be infructuous, and for the remaining supplies the petitioner's case is still maintainable.

37.Other objection has been raised by learned counsel for the respondents that the respondents have already entered into contract and the same has not been challenged, therefore the petition is not maintainable. But, in this connection, I am of the considered opinion that the objection raised by learned counsel for the respondents is not maintainable for the reason that in the first instance, the petitioner had made all the awardees of contract as respondents and had raised objections regarding rejection of his tender and allowing the tender of the respondents. The respondents during the pendency of this writ petition were aware of everything, they had opportunity to meet the points raised by the petitioner in the writ petition, and they have also

filed their return and contested the petition, therefore, merely on the technical ground this petition cannot be thrown away when the parties knowing fully well about the challenge have contested the petition. In the facts and circumstances of the case, merely on the basis of not challenging the contract awarded to the respondents, the petition cannot be rejected. Moreover, the claim in the relief clause (Para 7.3) is that the Court may issue appropriate writ of mandamus commanding the respondents to consider the petitioner's bid by opening the price bid and act in accordance with law and as per the terms and conditions of the tender notice. Therefore, granting this relief, I do not find any difficulty. In clause 7.4 of the petition it has been prayed that any other relief/reliefs, which the Court may think fit and proper in the facts and circumstances of the case may also be granted to the petitioner. As has been mentioned above, party respondents have put in their appearance, they have contested the petition, and the points which the petitioner has raised, the respondents have been able to contest and file reply. So, for out of 78 items orders for supply of 31 items have been placed and for the remaining items the orders are still be made. As such, to the extent that about remaining part of the tender items, supplies of which have not yet been made and contract has not been awarded, the petition is maintainable.

38. Shri P. Diwaker, learned Senior Counsel for respondent No.4 argued that in this petition disputed facts are involved, therefore, the writ petition is not maintainable. I do not find any substance in this argument also. In this connection, I am supported by the decision of the Apex Court in the matter of **ABL International Ltd. and other vs. Export Credit Guarantee Corporation of India Ltd. and others** reported in **(2004) 3 SCC 553**, in which the Court held that

> "In an appropriate case, the writ court has jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar in regard thereto. So where disputed questions of fact pertaining to the

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interpretation/meaning of documents or part(s) thereof are involved the courts can very well go into the same and decide the objections if facts permit."

39. In this connection, this matter also relates to contractual matter in which interpretation of NIT and also the process of selection of the tenderer is in question which can very well be decided on the basis of NIT and by interpreting the documents filed by the parties.

40. Moreover, this matter concerns to public interest, as public money is involved in this matter, and the petitioner has specifically alleged that the rates quoted by him are more competitive than that of the respondents. Therefore, in the public interest also it is necessary to pass appropriate order to prevent misuse of public finance and to ensure that competitive rates are achieved in the transaction. In this matter dispute is not purely concerning the interest of private parties, but issue regarding public fund and public money is also involved.

41. In the result, the writ petition is allowed to the extent that respondent No.2 shall give five days' opportunity to the petitioner asking him to explain the objections in writing raised by respondent No.2 on 17-11-2004 i.e. on the ground which the petitioner's bid was rejected and in case, the petitioner rectifies those defects on the same standard on which the other respondents' tenders have been found to be valid, then for future supply the petitioner's financial bid should be opened and his case be considered for future supply along with other tenderers, in accordance with law.

42. Respondent No.2 is further directed to ascertain from the Sales Tax Department regarding turn over for eligibility of respondent No.3 as on 30th September, 2004, as per clause 5 of Invitation of Bid as to whether respondent No.3 was fulfilling the turnover requirement as per the NIT as on 30th September, 2004, and after calling necessary information from the Sales Tax Department in respect of respondent No.3's turnover for the years 2002-03 & 2003-04, the petitioner

should also be allowed to peruse those documents and make submissions before respondent No.2. If respondent No.3, even thereafter, is found eligible then there is no question of taking further action, but in case, respondent No.3 is found to be ineligible then, no further order should be placed to respondent No.3.

43. As observed in the earlier part of this order that respondent No.2 allowed certain tenderers to rectify defects after expiry of last date, the whole tender process could have been cancelled. But, looking to the fact that certain supplies have already been made and such order will unnecessarily delay the supply of medical equipments and also there is likelihood of increasing financial burden, therefore, in larger public interest the above order has been passed.

Sd/-
L.C. Bhadoo
Judge
18th-7-2005

Soma/Bothe